would have a license to do something different from the U.S. Supreme Court. That's exactly the opposite of their oath.

Senator FEINSTEIN. So let me just put it a little more boldly. Do you support the holding of *Roe* that women have a constitutionally recognized and protected right to choose?

Mr. SUTTON. I would absolutely follow that decision and *Casey* and every case before me that implicated it.

Senator FEINSTEIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman HATCH. I said we would break, but Senator Feingold has a meeting at 1 o'clock, and he has asked if we can finish with him and then we will break for a half hour.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you very much, Mr. Chairman. My apologies, Professor Sutton.

Chairman HATCH. Do any of you need a break right now? Because if we can just wait for another 15 minutes, we will break.

Senator FEINGOLD. Perhaps this will shorten the afternoon. Mr. Chairman, I had planned an extensive critique of your decision to have all three of these people today, but in light of your courtesy, it will be a brief critique.

Chairman HATCH. That is very much appreciated.

Senator FEINGOLD. Mr. Chairman, I have just been so impressed with the way that you have run this Committee in the past and in your role as ranking member, and always appreciated your fairness. And I just have to say that I would have to be in the camp of those who say that having all three of these distinguished nominees on the same day is not the way that you have done things in the past, and I note your letter where you suggest in response to us that these nominees are not controversial. Well, the fact is they are extremely qualified people, but I do not think it is in the eyes of the Chairman to determine whether they are controversial or not. That is sort of our job. And these are controversial people.

Chairman HATCH. I will tell you, that is the first time that a poor Chairman has been taken over the coals like that, is all I can say.

[Laughter.]

Senator FEINGOLD. Oh, it is brutal.

Chairman HATCH. That is all right.

Senator FEINGOLD. I certainly do understand the pressure is on you with regard to all the back and forth on this issue with the administration and all these nominations, but I would urge the this not be done again, that we only have one controversial or allegedly controversial nominee per hearing.

Chairman HATCH. Well, Senator, if I could just interrupt you for a second without costing you any time. This is important, that we move with these three at this time. I am going to try and accommodate you, but I cannot limit it to just one. We held I think 11 with two last time. Senator Biden held one with three. This is my one with three. Now, I cannot guarantee you I will never do it again, but I think we ought to be able to move ahead, and I am prepared

to do what we have to do, but I will certainly take all of my colleagues' advice into great consideration.

Senator FEINGOLD. Thank you, Mr. Chairman.

Professor Sutton, I understand that you filed an amicus brief on behalf of the State of Alabama in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*. In the brief you argued that in passing the Clean Water Act, if Congress delegated authority to the Corps, allowing the promulgation of the migratory bird rule, such a delegation represented, in your words, "every measure of constitutional excess in full force," under the Commerce Clause. As you know, the Court, by a 5 to 4 majority, limited the authority of Federal agencies to use the so-called migratory bird rule as the basis for asserting Clean Water Act jurisdiction over non-navigable intrastate isolated wetlands, streams, ponds and other water bodies. In effect, the Court's decision removed much of the Clean Water Act protection for between 30 to 60 percent of the Nation's wetlands.

An estimate for my home State of Wisconsin suggested that 60 percent of the wetlands lost Federal protection in my State. Wisconsin is not alone. There is Nebraska, Indiana, Delaware and other states face water loss that have and will continue to have a devastating effect on our environment.

Now, in response to this decision of the Supreme Court, my own State, Wisconsin, passed legislation to assume the regulation of waters no longer under Federal jurisdiction. But many states have not followed suit. So last Congress I introduced the Clean Water Authority Restoration Act to clarify Congress's view that all waters of the United States, including those referred to as isolated, fall under the jurisdiction of the Clean Water Act.

Now, is it your view that Congress's authority for passing the Clean Water Act stems solely from the Commerce Clause or might one find reason for Congressional authority over protection of wetlands in not just the Commerce Clause, but perhaps the Property Clause, the Treaty Clause or the Necessary and Proper Clause?

Mr. SUTTON. Yes. Thank you, Senator. Obviously in the federalism area, environmental issues raise some issues that aren't raised in other federalism cases, and that's principally as a result of the externality problem that I'm sure you're familiar with. When one State does something that imposes no cost on them and imposes cost on another State, whether it's water or air, and I think the U.S. Supreme Court has been very attentive to that and the cases make that clear.

In terms of writing that brief again for a client in that case, it was aware statutory interpretation case. It as not a constitutional case necessarily. It was a statutory interpretation case first and foremost, and that of course is how it ultimately was resolved on the grounds you indicated. And on behalf of the client, we made the argument that the underlying statute—and the underlying statute referred to Federal jurisdiction over, quote, "navigable waters." And the position that was taken and actually the lead lawyer for the case is someone who's done a lot of work in a lot of different areas in this, but took the view that "navigable" can't possibly mean every water there is anywhere in the country. It has to be

water connected to something that's quote, "navigable." And we advanced that position in the brief on behalf of that client.

The second argument that was made that I'm sure you're familiar with is what's called a constitutional avoidance argument, and the notion of a constitutional avoidance argument is really a—it's a backup to a statutory interpretation argument. And what lawyers are trying to do there—and I do feel I had an obligation to make this argument. I think it would have been malpractice—

Senator FEINGOLD. But in answer to my question, you do not rule out the possibility of Congressional authority over protection of wetlands based on the other clause in the Constitution?

Mr. SUTTON. Oh, of course not, of course not.

Senator FEINGOLD. Let me ask a more general question. In passing our Federal environmental laws, Congress in some cases seeks to justify such action on Commerce Clause grounds by describing the relationship between the resources we seek to protect and economic activities conducted in or affecting those resources that are part of interstate commerce. For example, in passing the Clean Water Act, Congress restricted discharges from point sources such as manufacturing plants, which make products that are then sold in interstate commerce. Do you believe that such justifications, if included in the legislative history or Congressional findings are insufficient to establish the basis for Congressional action to protect the environment under the Constitution?

Mr. SUTTON. Well, I have to acknowledge, it's not something I know a lot about, I mean the laws you're referring to. It's just not something I've dealt with, and I don't know whether it's something that could come before me as a judge. I do know the U.S. Supreme Court decisions give broad deference to Congress and they have given broad deference to Congress in the environmental arena. In fact, I'm not aware of—there probably is such a case. Someone's going to find it, but I'm just not aware of a case where they've struck environmental law on the ground that it exceeded Congress's Commerce Clause power, so it seems to me those precedents support what you're suggesting. And if that's true, Court of Appeals judges would have to follow them.

Senator FEINGOLD. Then let's turn to a better decision of Justice Holmes, who we discussed before. In 1920 Justice Holmes explained that the Federal Government must provide protection for migratory birds because actions by the States individually would be ineffectual. He said migratory birds can be protected only by national action in concert with that of another power. We see nothing in the Constitution that compels the Government to sit by while a food supply I cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States, Justice Holmes wrote.

Your brief in the *Swank* case takes a directly contrary position. Whereas Justice Holmes viewed the protection of migratory birds and wetlands as a national interest of very nearly the first magnitude, you argued that it is truly a matter of local oversight. Do you really believe that the protection of these habitats is simply just a matter of local oversight? In what circumstances are Federal protections warranted?

Mr. SUTTON. Yes. It's been a while. I think the case you're referring to may be *Missouri* v. *Holland*. It's been a while since I've read it. I'm not sure if I've got the right case, but if it's the case I'm thinking of, I thought it was a case that was about Congress's treaty powers. I may be wrong about that, and obviously that was not implicated at all in the Cook County case that you're referring to. But the point I would make is again, I was simply representing a client, and it was first and foremost a statutory interpretation case. The constitutional arguments that were made were made as constitutional avoidance arguments, and the whole premise of that argument is asking the Court not to reach the constitutional argument. That's why an advocate makes that argument. They're signaling to the Court, you do not want to wrestle with the difficult constitutional issues raised by this law, and you shouldn't do that. And the best way to do that is to deal with the case on statutory interpretation grounds, and that's what the Court ultimately did.

Senator FEINGOLD. Fair enough. In the amicus brief you also argue that the interstate commerce justifications for regulating wetlands used by migratory birds were false because activities conducted in wetlands, such as bird watching and hunting are non-economic. Well, in my home State of Wisconsin hunters spent $500 million on deer hunting alone in 2002. And we have been deeply concerned that the emergence of chronic wasting disease in our State has curbed the hunting effort and it has hurt our economy. Can you explain why you consider these activities to be non-economic?

Mr. SUTTON. Well, I am not a hunter. I have never fired a gun, so maybe that's my problem. I didn't appreciate that fact, and maybe that's exactly what the Court should have said in dealing with that argument. But again, it was part of a constitutional avoidance argument that the Court didn't reach and we were actually encouraging them not to reach in that case.

Senator FEINGOLD. Let me ask you finally this point, more generally. If we were to try to protect these habitats under your argument, we would in effect have the only differing State Clean Water Act for protection. How can you ensured Americans that under this system, your vision of the way this works, that there would be any sort of floor of national environmental protections or any uniform standard of clean water in this country?

Mr. SUTTON. Well, I think that point goes exactly to what you were saying Justice Holmes said in the case. I may be misremembering, but at least what you were reading from the case makes clear the point I said at the outset, that in environmental concerns, the U.S.—environmental laws and environmental cases, the U.S. Supreme Court has made clear there are externality issues that alter the equation, and the reasons they alter the equation is exactly the reason you're suggesting, and that reason is that sometimes one state, one city, one county can impose costs, environmental costs, pollution costs, on others because of the direction of the wind, the direction of the water, a navigable water flows, and that's exactly why Congress has entered that sphere, and it's exactly why the U.S. Supreme Court has said they should enter that sphere, and Court of Appeals judges would be obligated to follow those decision, and I certainly would be happy to.

Senator FEINGOLD. I appreciate your answers to those questions. Let me turn to the age discrimination issue, *Kimel* decision which came down in 2000. In *Kimel* v. *Florida Board of Regents*, again the Supreme Court ruled 5 to 4 that State employees could not bring private suits for monetary damages against States under the Age Discrimination and Employment Act. As you know, the ADEA is a Federal law that prohibits employers, including States to refuse to hire, to discharge or otherwise discriminate against an employee based on an employee's age. The majority of the Court found that while Congress intended to abrogate States' immunity, that abrogation exceeded Congress's authority under Section 5 of the 14th Amendment.

Do you believe that older workers who are employed by private businesses are entitled to protection under Federal civil rights laws like the Age Discrimination and Employment Act?

Mr. SUTTON. I'd like to talk about that case, but of course the ADEA requires that very thing. The brief for the State of Florida made it quite clear that the ADEA did protect all State employees and Federal employees and private employees when it comes to relief like getting your job back, in some cases back pay. The underlying issue in that case which divided the Court along the 5–4 grounds to which you're referring was not the question of Section 5 power, all right, but the question of whether Congress had permissibly used its Section 5 power in passing the ADEA. The question that divided the Court along 5–4 grounds was the issue of whether Commerce Clause legislation, because everyone agrees the ADEA was also Commerce Clause legislation. Whether that type of legislation, that source of constitutional authority, could give Congress the right to create money damages actions. I should tell you that was not something we briefed in that case. The *Seminole Tribe* issue did not come up either oral argument or in the briefing, but it was how the Court broke down. Not 1 of 9 wrote an opinion disagreeing with the Section 5 interpretation we—

Senator FEINGOLD. Let me ask you this. Do you believe it was wrong for Congress to enact the ADEA in the first place?

Mr. SUTTON. Of course not.

Senator FEINGOLD. If confirmed to the Sixth Circuit and legislation restoring the right of older State workers to sue their State employees were enacted and became the law of the land, how would you treat a claim of age discrimination against a State before you? Would you uphold the new Federal law?

Mr. SUTTON. I mean I would do exactly what the U.S. Supreme Court required in that area, and the notion that the ADEA could be struck is borderline laughable. I mean there's a case—I think it's Wisconsin—Wyoming—excuse me, wrong state. I can see why I said Wisconsin. *Wyoming* v. *EEOC* in which the Court specifically upheld the ADEA under Congress's Commerce Clause power, so of course a Court of Appeals judge would be obligated to follow that law and enforce it.

Senator FEINGOLD. Thank you very much. I will wait for further rounds for other questions, so that people can take a break.

Chairman HATCH. Thank you, Senator Feingold. We are going to give you until 1:30 which is almost 45 minutes. So we will recess

for 45 minutes, and I am going to start precisely at 1:30. With that, we will recess until 1:30.

[Luncheon recess taken at 12:49 p.m.] AFTERNOON SESSION [1:39 p.m.]

Chairman HATCH. We will call this meeting to order again. I do not see any other Senators here at this time, so I will just start it off with you, Mr. Roberts. I want to ask a few questions of you, and then hopefully, if I have enough time, Justice Cook, I will ask a few of you as well.

We now have this timer, so our poor guy does not have to stand there with a little slip of paper. I felt sorry for him.

It seems to me that both Mr. Roberts and Mr. Sutton are being criticized for positions they have taken as attorneys representing clients. Now, this is patently unfair, and it is inappropriate because attorneys do represent clients, and they should not be judged by who our clients are. Any of us who have tried cases know that sometimes our clients may not be savory, but the case may be a good case, who knows?

Now, attorneys are required to represent their clients, and this is the case whether their client is the U.S. Government, a State Government, a private citizen or a corporation, and this fact is so fundamental that it should go beyond reproach.

In any legal matter, the arguments a lawyer makes in the role of a zealous advocate on behalf of a client are no measure of how that lawyer would rule if he were handling the same matter as a neutral and detached judge, and I think it is very unfair to imply that the judgeship nominee would not follow the law.

Now, this is because lawyers have an ethical obligation to make all reasonable arguments that will advance their clients interests. According to Rule 3.1 of the ABA's model rules of professional conduct, a lawyer may make any argument if, "there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law."

Now, lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they the judge or a judge.

Now, Mr. Roberts, although my Democratic colleagues are, and some in the Senate and elsewhere, have tried to paint you as an extremist, the truth is, is that you are a well-respected appellate lawyer, who has represented an extremely diverse group of clients before the courts. In fact, you have often represented clients and what is considered to be the so-called "liberal" position on issues. I would just like to ask you about a few of these cases.

In the case of *Barry* v. *Little*, you represented welfare recipients in the District of Columbia, right?

Mr. ROBERTS. That is correct, Mr. Chairman.

Chairman HATCH. You took this case on a pro bono basis; is that correct?

Mr. ROBERTS. Yes.

Chairman HATCH. Pro bono means that you did not get paid for it.

Mr. ROBERTS. No, I did not.